STATE OF MICHIGAN

IN THE SUPREME COURT

Proposed Amendment
Of Subchapter 9.200
Of the Michigan Court Rules

99-31

JUDICIAL TENURE COMMISSION'S

COMMENT ON PROPOSED AMENDMENTS

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INTRODUCTION

On January 14, 2002, the Supreme Court published proposed revisions to MCR 9.200 *et seq.* for comment by the legal community pursuant to MCR 1.201. The proposed rules are incorporated into this document, and are identified below as the "proposed rules." The rules in effect as of this date are identified as the "current rules."

A summary recommendation, including a ranking as to the Judicial Tenure Commission's ("the Commission's") concern regarding the proposal, precedes the rules and comments. Thereafter, each proposed rule is listed on a new page. Where the Commission agrees with the proposed change, or the change is a matter of "housekeeping" such as standardizing language, the rule is not included here, and the Commission has no comment. If the Commission disagrees with a proposal, the substance of the difference will be addressed. Each comment is labeled "high," "moderate," or "low" concern, to the Commission's. Where the Commission has a high- or moderate concern, the Commission has also provided an alternative rule.

SUMMARY RECOMMENDATION

Highest Concern

9.203(A)- Administrative Rules
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9.207(C)(2)- 28-day letters on all but outright dismissals
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9.207(C)(4)- Limited notice of disposition to grievant upon dismissal
9.208(C)- Discovery- failure to limit work product and confidential files
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9.202(E)- Majority to act on motion or resolution
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9.214- Transcripts distributed by master with report
9.215- Failure to allow for arguments in favor of master's report
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PROPOSED 9.201

Rule 9.201 Definitions

As used in this chapter, unless the context or subject matter otherwise requires

(1) "commission" means the Judicial Tenure Commission;

(2) "judge" means a person who is serving as a judge of an appellate or trial court by virtue of election, appointment, or assignment, or a person who formerly held such office and is named in a request for investigation with respect to conduct that occurred during the person's tenure and is related to the office, or a magistrate or referee ~~of a court~~ appointed or elected under the laws of this state;

Comment- *Moderate concern*

The Commission is concerned that the proposed rule is not explicit, and some may read it as limiting the Commission's jurisdiction for ***all*** judges (not just former judges) to conduct that occurred during the judge's tenure and which is related to the office. If that interpretation is utilized, judges would have a "free pass" for conduct not relating to their office, or committed while they were an attorney but discovered as a judge. It is noteworthy that the Attorney Grievance Commission cannot take action against a judge until the Commission recommends a sanction. MCR 9.116(B)

Although the comma inserted after the word "assignment" in proposed 9.201(2) belies that extreme limitation on the Commission's jurisdiction, and proposed 9.205(B)(2) states the Code of Judicial Conduct and Rules of Professional Conduct may form a basis for action with regard to a judge, proposed

9.201(2) could be better drafted to clarify the issue. The impact of proposed 9.205(B)(2) is also questionable as the sentence granting the Commission jurisdiction over a judge's conduct whenever it was committed was deleted in its entirety, implying that Commission would no longer have jurisdiction over acts committed prior to or after taking office. Also, the proposed rule does not provide for the mandatory referral of any complaints against former judges who are not serving in a judicial capacity to the Attorney Grievance Commission.

The benefits of having jurisdiction over former judges is more than outweighed by the costs of prosecuting allegations of misconduct against those individuals, as there are limited sanctions available. If the judges are not sitting on the bench, they can only be admonished or censured. It is more efficient to grant jurisdiction to the Attorney Grievance Commission. However, the Commission suggests that the definition conform to *In re Probert*, 411 Mich 210 (1981), in that the Commission should retain jurisdiction over a former judge if a formal complaint was filed while the judge held office. The reason for that distinction is that judges who have recently left the bench are more likely to sit as visiting judges.

It is also significant that giving the Commission continuing jurisdiction over former judges to some extent conflicts with the specific inclusion of laches as a defense. The more time that passes since a judge has left office, the less likely

assignments will be awarded, and the more likely laches will come into play. The *Probert* standard should be codified into the court rules.

The alternative rule below has also been written to clarify that the limitations to the term "judge" apply to magistrates and referees. Under the proposed rule, the segregation of magistrates and referees implies differing jurisdiction may apply to those holding that office.

ALTERNATIVE 9.201(2)

(2) "judge" means:

(a) a person who is serving as a judge of an appellate or trial court, *a magistrate, or a referee,* by virtue of election, appointment, or assignment*, or*

(b) a person who formerly held such office and is named in a request for investigation *that was filed during the person's tenure and is related to the office*;

[Based on Supreme Court proposed MCR 9.201(2).]

PROPOSED 9.201(6)

(6) "examiner" means the executive director or equivalent staff member or other attorney ~~one or more attorneys~~ appointed by the commission to ~~gather and~~ present evidence ~~and to act as counsel for the commission~~ at a hearing before a master, the commission, or ~~in proceedings in~~ the Supreme Court~~, before a master, or before the commission~~;

Comment- *Moderate concern*

The proposed rules appear to open the door for the executive director's duties to be divided among two or more individuals.

ALTERNATIVE 9.201(6)

(6) "examiner" means the executive director *or, if the executive director has a conflict, an equivalent staff member or other attorney appointed by the commission, who shall* present evidence at a hearing before a master, the commission, or in proceedings in the Supreme Court;

[Based on Supreme Court proposed MCR 9.201(6).]

PROPOSED 9.202(A)

Rule 9.202 Judicial Tenure Commission; Organization

(A) Appointment of Commissioners. As provided by Const 1963, art 6, § 30, the Judicial Tenure Commission consists of 9 persons. The commissioners selected by the judges ~~are to~~ shall be chosen by mail vote conducted by the state court administrator. The commissioners selected by the state bar members ~~must~~ shall be chosen by mail vote conducted by the State Bar of Michigan. Both mail elections must be conducted in accordance with nomination and election procedures approved by the Supreme Court. Immediately after a commissioner's ~~election or appointment, the Governor, the state court administrator, and the State Bar of Michigan~~ selection, the selecting authority shall notify ~~give notice of the election or appointment to~~ the Chief Justice.

Comment- *Low concern*

The proposed rule has several revisions that merely simplify the language of the rule. One omission is that the executive director should be notified of a commissioner's selection. The rule should be revised to conform to existing practice.

ALTERNATIVE 9.202(A)

(A) Appointment of Commissioners. As provided by Const 1963, art 6, § 30, the Judicial Tenure Commission consists of 9 persons. The commissioners selected by the judges shall be chosen by mail vote conducted by the state court administrator. The commissioners selected by the state bar members shall be chosen by mail vote conducted by the State Bar of Michigan. Both mail elections must be conducted in accordance with nomination and election procedures approved by the Supreme Court. Immediately after a commissioner's selection, the selecting authority shall notify the Chief Justice *and the executive director***.**

[Based on Supreme Court proposed MCR 9.202(A).]

PROPOSED 9.202(C)

(C) Vacancy.

(1) A vacancy in the office of a commissioner occurs:

(a) when a commissioner resigns or is incapable of serving as a member of the commission;

(b) when a judge who is a member of the commission no longer holds the office ~~which he or she~~ held when selected;

(c) when an attorney selected by state bar members is no longer ~~admitted~~ entitled to practice in the courts of this state; and

(d) when an appointee of the Governor becomes an attorney ~~or accepts a judicial position~~.

Comment- *Low concern*

The rule as written would create a vacancy as to the judge elected by the members of the state bar if that judge is elected or appointed to a different judicial office, even if the individual remained a state judge. For example, if the individual was a district judge and was appointed to fill a vacancy in the circuit court, there is no change in status that relates to the bar membership's selection of the individual as its judicial representative. An exception should be included to address that probably rare occurrence.

ALTERNATIVE 9.202(C)(1)(b)

(b) when a judge who is a member of the commission no longer holds the office held when selected*, except that the judge elected by members of the state bar may continue as a commissioner if elected or appointed to a different eligible court*;

[Based on Supreme Court proposed MCR 9.202(C)(1)(b).]

PROPOSED 9.202(C)

(2) Vacancies must be filled by selection of a successor in the same manner required for the selection of ~~his or her~~ the predecessor. The commissioner selected shall hold~~s~~ office for the unexpired term of the ~~his or her~~ predecessor. If a commissioner is elected or appointed to a succeeding term, and a vacancy occurs during the unexpired term of the commissioner being replaced, the replacement commissioner shall fill the vacancy and serve the unexpired term. Vacancies must be filled within 3 months after the vacancy occurs.

Comment- *Improvement plus low concern*

The proposed rule is welcome, but the added language is cumbersome. An alternative is set forth below.

ALTERNATIVE 9.202(C)(2)

(2) Vacancies must be filled by selection of a successor in the same manner required for the selection of the predecessor. The commissioner selected shall hold office for the unexpired term of the predecessor. *If a vacancy occurs within 3 months before or any time after an election for the office of a commissioner takes place, the commissioner-elect shall fill that vacancy and serve the remainder of the unexpired term.* Vacancies must be filled within 3 months after the vacancy occurs.

[Based on Supreme Court proposed MCR 9.202(C)(2).]

PROPOSED 9.202(E)(1)

(E) Quorum and Chairperson.

(1) The commission ~~elects~~ shall elect from its members a chairperson and a vice-chairperson, each to serve 2 years. The vice-chairperson shall act~~s~~ as chairperson when the chairperson is absent. If both are absent, the members present may select one among them to act as temporary chairperson.

Comment- *Low concern*

The Court's changes are grammatical, not substantive. The proposed rule did not adopt the Commission's suggestion, to reflect the long-standing practice of the Commission, that the rule provide for the Commissioners to elect a Secretary. The office of secretary is consistent with the practice of the Attorney Grievance Commission, MCR 9.108(D)(1), and the Attorney Discipline Board, MCR 9.110(D)(1).

PROPOSED 9.202(E)(2)-(3)

(2) A quorum for the transaction of business by the commission is 5.

(3) The vote of a majority of the members constitutes the adoption or rejection of a motion or resolution before the commission. The chairperson is entitled to cast a vote as a commissioner.

Comment- *Moderate concern*

The Commission recommends a revision to the majority requirement to conform to the practice currently utilized by the Attorney Discipline Board, Attorney Grievance Commission and even the Supreme Court. The current and proposed judicial disciplinary rules mandate a majority of the Commission "members," *i.e.,* five, to adopt or reject a motion or resolution. The Supreme Court, Attorney Discipline Board, and Attorney Grievance Commission require a majority of the **members *present*** to act, as long as there is a quorum. The applicable authority is MCR 9.110(D)(2)[1] as to the Attorney Discipline Board, MCR 9.108(D)(2)[2] as to the Attorney Grievance Commission, and MCR 7.316(C)[3], specifying a majority of the members voting, as to the Supreme Court.

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[1] "Five members constitute a quorum. The board acts by a majority vote of the members present."

[2] "Five members constitute a quorum. The commission acts by a majority vote of the members present."

[3] "* * * Except for affirmance of action by a lower court or tribunal by even division of the justices, a decision of the Supreme Court must be made by concurrence of a majority of the justices voting."

Additional authority as to the Supreme Court is found at MCL 600.211[4] and *Negri v Slotkin,* 397 Mich 105 (1976).[5]

A revision to this rule is distinct from MCR 9.220(A), addressing a recommendation for action by the Supreme Court, which still requires five votes to make such a significant recommendation. However, even that provision allows some leeway, as when a recommendation is based on the report of a master, a Commissioner not present at the Commission hearing can vote to recommend action upon review of the hearing transcript.

ALTERNATIVE 9.202(E)(3)

(3) *Except as provided under MCR 9.220(A),* the vote of a majority of the members *present and eligible to vote* constitutes the adoption or rejection of a motion or resolution before the commission. The chairperson is entitled to cast a vote as a commissioner.

[Based on Supreme Court proposed MCR 9.202(E)(3).]

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[4] "A majority of the justices shall constitute a quorum for hearing cases and transacting business."

[5] "We hold that a three-to-two decision of this Court such as that reached in *Manistee Bank & Trust Co* is binding on the Court of Appeals and the trial courts until overruled by a later decision of this Court, including, if that be the case, a later three-to-two decision of this Court. We limit our decision to the question before us, namely are lower courts bound by majority decisions of less than four justices. We, of course, answer that affirmatively."

PROPOSED 9.202(G)

(G) Commission Staff.

(1) The commission shall employ an executive director or equivalent person or persons, and such other staff members as the commission concludes are warranted, to perform the duties that the commission directs, subject to the availability of funds under its budget.

The Commission has concerns, as it is unclear why an individual other than the executive director would be needed to perform the duties of managing the Commission offices.

ALTERNATIVE 9.202(G)(1)

(1) The commission shall employ an executive director and such other staff members as the commission concludes are warranted, to perform the duties that the commission directs, subject to the availability of funds under its budget.

[Based on Supreme Court proposed MCR 9.202(G)(1).]

(2) The executive director or any other staff person who is involved in the investigation or prosecution of a judge

(a) shall not be present during the deliberations of the commission or participate in any other manner in the decision to file formal charges or to recommend action by the Supreme Court with regard to that judge, and

(b) shall have no ex parte communication with the commission regarding a formal complaint that the commission has authorized.

Comment- *Moderate concern*

The subject matter of this rule is entirely new but generally codifies current practice of the Commission and staff. It mandates that any staff who is involved in

an investigation or prosecution of a judge be absent from any deliberations and not participate in a decision to file formal charges or recommend action by the Supreme Court. It further mandates that the any staff who participated in the investigation or prosecution of a judge have no *ex parte* communication with the Commission regarding a formal complaint against the judge. That is all in conformity with current practice. However, the rule has no exception allowing the executive director to have limited *ex parte* contact with the Commission to tend to administrative and procedural matters, similar to the exception found at Canon 3A(4) of the Code of Judicial Conduct, also in conformity with current practice.

ALTERNATIVE 9.202(G)(2)

(2) The executive director or any other staff person who is involved in the investigation or prosecution of a judge

(a) shall not be present during the deliberations of the commission or participate in any other manner in the decision to file formal charges or to recommend action by the Supreme Court with regard to that judge, and

(b) shall have no ex parte communication with the commission regarding a formal complaint that the commission has authorized*, except for scheduling, administrative purposes, or emergencies that do not deal with substantive matters or issues on the merits, provided:*

(i) the contact will not reasonably lead to a procedural or tactical advantage for any party, and

(ii) the executive director promptly notifies the judge or judge's counsel of the substance of the ex parte communication.

[Based on Supreme Court proposed MCR 9.202(G)(2) and Code of Judicial Conduct Canon 3A(4).]

PROPOSED 9.203

Rule 9.203 Judicial Tenure Commission; Powers; Review

(A) Authority of Commission. The commission has all the powers provided for under Const 1963, art 6, § 30, and further powers provided by Supreme Court rule. Proceedings before the commission or a master are governed by these rules. The commission may adopt and publish administrative rules for its internal operation and the administration of its proceedings that do not conflict with this subchapter and shall submit them to the Supreme Court for approval.

(B) Review as an Appellate Court. The commission may not function as an appellate court to review the decision~~s~~ of ~~the~~ a court or to exercise superintending or administrative control of ~~the~~ a court~~s~~, ~~except as that review~~ but may examine decisions ~~is~~ incident to a complaint of judicial misconduct, disability, or other circumstance that the commission may undertake to investigate under Const 1963, art 6, § 30, and MCR 9.207. An erroneous decision by a judge made in good faith and with due diligence is not judicial misconduct.

(C) Control of Commission Action. Proceedings under these rules are subject to the direct and exclusive superintending control of the Supreme Court. No other court has jurisdiction to restrict, control, or review the orders of the master or the ~~tenure~~ commission.

(D) Errors and Irregularities. An investigation or proceeding~~s~~ under this chapter may not be held invalid by reason of a nonprejudicial irregularity or for an error not resulting in a miscarriage of justice.

(E) Jurisdiction Over Visiting Judges. Notwithstanding MCR 9.116(B), the Attorney Grievance Commission may take action immediately ~~against~~ with regard to a visiting judge who currently holds no other judicial office if the allegations ~~of misconduct~~ pertain to professional or personal activities unrelated to the ~~respondent's~~ judge's activities as a judge.

Comment – High Concern

The Commission has not had "official" administrative rules since before adoption of the Michigan Court Rules of 1985. Previous administrative rules were incorporated into the MCRs when the Court abolished the GCRs. The

Commission has adopted a number of policies, and some of those policies affect procedure.

Rather than tie the Commission's internal operations to the rule making authority of the Court, the Commission proposes ***deleting*** the requirement that such internal rules must be first approved by the Court. Neither the Attorney Grievance Commission nor the Attorney Discipline Board has any such requirement. Similarly, the Clerk's Office to the Court of Appeals has implemented Internal Operating Procedures (IOP's) without Supreme Court approval, or official sanction of the Court of Appeals. This Court, too, handles many procedural matters via Administrative Order rather than the full formality of a court rule.

The Commission suggests allowing the Commission to develop its own IOP's so long as they are not inconsistent with the court rules. The Commission would submit then to the Court for filing (but not for approval), and would publish them and make them available to the public.

ALTERNATIVE 9.203(A)

(A) Authority of Commission. The commission has all the powers provided for under Const 1963, art 6, § 30, and further powers provided by Supreme Court rule. Proceedings before the commission or a master are governed by these rules. The commission may adopt and publish administrative rules for its internal operation and the administration of its proceedings that do not conflict with this subchapter and shall submit them to the Supreme Court.

PROPOSED 9.204

Rule 9.204 Disqualification of Commission Member or Employee

(A) Disqualification ~~F~~rom Participation. A judge who is a member of the commission or of the Supreme Court is disqualified from participating in that capacity in proceedings involving the judge's ~~his or her~~ own actions ~~discipline, suspension, retirement, or removal~~.

(B) Disqualification from Representation. A member or employee of the ~~Judicial Tenure~~ ~~C~~ommission may not represent

(1) a respondent in proceedings before the commission, including preliminary discussions with employees of the commission prior to the filing of a request for investigation; or

(2) a judge ~~or former judge~~ in proceedings before the Attorney Grievance Commission, or the Attorney Discipline Board and its hearing panels, as to any matter that was pending before the Judicial Tenure Commission during the member's or employee's tenure with the ~~Judicial Tenure~~ ~~C~~ommission.

Comment – Moderate Concern

The Commission suggests modifying subparagraph(A) further to include the reasons for disqualification set forth in MCR 2.003(B).

ALTERNATIVE 9.204(A)

Rule 9.204 Disqualification of Commission Member or Employee

(A) Disqualification ~~F~~rom Participation. A judge who is a member of the commission or of the Supreme Court is disqualified from participating in that capacity in proceedings involving the judge's ~~his or her~~ own actions ~~discipline, suspension, retirement, or removal~~ or for any reason set forth in MCR 2.003(B).

(B) Grounds for Action ~~Discipline~~. A judge is subject to censure, suspension with or without pay, retirement, or removal for conviction of a felony, physical or mental disability that prevents the performance of judicial duties, misconduct in office, persistent failure to perform judicial duties, habitual intemperance, or conduct that is clearly prejudicial to the administration of justice ~~as defined by subrule (C) or because of disability as defined in subrule (D).~~

(1~~C~~) Misconduct in office includes, but is not limited to ~~A judge is guilty of misconduct in office if~~:

~~(1) the judge is convicted in the United States of conduct which is punishable as a felony under the laws of Michigan or federal law;~~

~~(2) the judge persistently fails to perform judicial duties;~~

~~(3) the judge is habitually intemperate within the meaning of Const 1963, art 6, § 30;~~

(4) ~~the judge's conduct is clearly prejudicial to the administration of justice;~~

~~(5)~~ (a) ~~the judge is~~ persistent~~ly~~ incompeten~~ce~~ or neglect~~ful~~ in the timely performance of judicial duties;

~~(6)~~ (b) ~~the judge~~ persistent~~ly fails~~ failure to treat persons fairly~~, with~~ and courteously ~~and respect~~; ~~or~~

~~(7)~~ (c) ~~the judge~~ treat~~m~~ent of a person unfairly~~,~~ or discourteously~~, or disrespectfully~~ because of the person's race, gender, or other protected personal characteristic;

(d) misuse of judicial office for personal advantage or gain, or for the advantage or gain of another; and

(e) failure to cooperate with a reasonable request made by the commission in its investigation of a judge.

(2) Conduct in violation of the Code of Judicial Conduct or the Rules of Professional Conduct may constitute a ground for action with regard to a judge.

(3) In deciding whether action with regard to a judge is warranted, the commission shall consider all the circumstances, including the age of the allegations and the possibility of unfair prejudice to the judge because of the staleness of the allegations or unreasonable delay in pursuing the matter.

~~(D) Disability. A judge is subject to suspension, retirement, or removal from office for physical or mental disability which significantly interferes with the capacity to perform his or her judicial duties.~~

~~(E) Code of Judicial Conduct; Rules of Professional Responsibility. Conduct in violation of the Code of Judicial Conduct or rules of professional responsibility, whether the conduct complained of occurred before or after the respondent became a judge or was or was not connected with his or her judicial office, may constitute misconduct in office, conduct that is clearly prejudicial to the administration of justice, or another ground for discipline listed in Const 1963, art 6, § 30. The question in every case is whether the conduct complained of constitutes misconduct in office, conduct that is clearly prejudicial to the administration of justice, or another ground of discipline listed in Const 1963, art 6, § 30, not whether a particular canon or disciplinary rule has been violated. All the circumstances are to be considered in deciding whether action by the commission is warranted.~~

Comment- *Moderate concern*

The Code of Judicial Conduct is incorporated elsewhere in the proposed rules so the deletion of that provision here is not objectionable. However, provisions of the current rule that address conduct committed prior to becoming a judge, for example, are still not otherwise included in the proposed rules. Proposed MCR 9.205(B)(2) appears to be a substitute for current court rule MCR 9.205(E), but fails to include significant provisions of the present court rule which help define misconduct within the commission's jurisdiction. As noted above, this

omission could be corrected as addressed above at proposed rule 9.201(2) concerning the definition of "judge," but it should be corrected in this rule as well.

ALTERNATIVE 9.205(B)- introductory paragraph only

(A) Grounds for Action. A judge is subject to censure, suspension with or without pay, retirement, or removal for conviction of a felony, physical or mental disability that prevents the performance of judicial duties, misconduct in office, persistent failure to perform judicial duties, habitual intemperance, or conduct that is clearly prejudicial to the administration of justice, *whether the conduct complained of occurred before or after the respondent became a judge or was not connected with his or her judicial office*.

[Based on Supreme Court proposed MCR 9.202(G)(2) and current MCR 9.205(E).]

PROPOSED 9.206

Rule 9.206 Service ~~and Notice~~

(A) ~~Service~~ Judge. When provision is made under these rules for serving notice of a complaint or other document on a judge ~~or respondent~~, the notice must be made by service in person or by registered or certified mail to the judge's ~~his or her~~ judicial ~~business~~ office or last known residence. If an attorney has appeared for a judge ~~respondent~~, notice may be served on the attorney in lieu of service on the judge ~~respondent~~.

(B) ~~Notice~~ Commission. Service of notice on the commission must be made by personal delivery ~~delivering~~ or ~~mailing~~ by registered or certified mail to the ~~commission's~~ executive director at the commission's office.

Comment- *Low concern*

The proposed rule concerning service is somewhat confusing because of the references to serving **"notice"** on the judge (or attorney) and service of **"notice"** on the Commission. This language implies a non-existent requirement of prior notice before serving a complaint, answer, or other document, when it should simply refer to service of a pleading, *i.e.,* complaint or answer, or other documents in formal proceedings. The Michigan Court Rules addressing the initiation of a civil action merely refer to "service" and make no mention of "service of notice."

ALTERNATIVE 9.206

Rule 9.206 Service

(A) Judge. When provision is made under these rules for serving a complaint or other document on a judge, *the service must be made* in person or by registered or certified mail to the judge's judicial office or last known residence. If an attorney has appeared for a judge, *service* may be on the attorney in lieu of service on the judge.

(B) Commission. *Service* on the commission must be made by personal delivery or by registered or certified mail to the executive director at the commission's office.

[Based on Supreme Court proposed MCR 9.206.]

PROPOSED 9.207(C)

(C) Notice to Judge.

(1) Request for investigation. The commission must promptly give written notice to the judge who is the subject of a request for investigation unless the commission determines that the request is clearly unfounded or frivolous, or that the interests of justice require that notice be postponed. The purpose of the notice is to afford the judge an opportunity to apprise the commission, in writing within 28 days, of such matters as the judge may choose, including information about the factual aspects of the allegations and other relevant comments. The notice shall specify the allegations and may include the date of the conduct, the location where the conduct occurred, and the name of the case or identification of the court proceeding relating to the conduct.

(2) If the judge is not notified under subrule (C)(1), the commission must provide such written notice b~~e~~fore filing a complaint or taking action under subrule (B)(2)-(5). ~~recommending an order of private censure, the commission must give written notice to the judge of the nature of the charges being made and afford~~ The notice shall provide the judge an opportunity to present in writing, within 28 days, any matters the judge chooses for consideration by the commission.

Comment combined as to sub-rules (1) and (2)- *High concern*

The Commission is greatly concerned that the proposed rule calls for notice of requests for investigation to be sent to ***all*** judges unless the Commission determines the request is unfounded or frivolous, or the interests of justice require notice to be postponed. Many of the Commission's investigations are more effective when they are done confidentially. In an overwhelming majority of the grievances, the Commission finds after some preliminary investigation (such as obtaining a transcript, reviewing the court file, or conducting an interview of the

grievant or other pertinent witnesses) that a dismissal is warranted, without the judge's comment. Thus, of the 477 dismissals in 2000, approximately 433 (*i.e.,* 90%) were dismissed *without* the need of the Respondent-judge's comment. When the Commission, in its investigatory role, determines that a judge's comment is needed or would be helpful, the Commission seeks it out.

Moreover, often the investigation requires discretion. If the allegations concern a judge's demeanor or work ethic, the Commission needs a free hand to investigate without having to tip off the subject of the investigation. If the Respondent judge knows the judge's on-the-bench comments are the subject of scrutiny, the judge is sure to change his or her behavior – at least while the investigation is pending. If the judge is under suspicion of working only half-days, that judge is certain to alter his or her conduct during the pendency of the investigation. A mandatory disclosure rule such as the one proposed here seriously impedes the Commission's ability to conduct a fair investigation. Moreover, upon conclusion of the investigation, the judge will receive notice under current practice, even if the judge's comments were not needed to resolve the grievance with a dismissal.

Proposed sub-rule (1) mimics the attorney disciplinary system. Due to the number of grievances there, mandatory comment is necessary. Under the current judicial disciplinary system preliminary investigations are conducted to determine

if the judge's "input" is necessary. As noted above, 90% of the time it was not. Judicial investigations more frequently require confidentiality than investigations of attorneys (as is apparent in the "half-day" example above, which would not arise in attorney grievance investigations).

Further, attorneys typically seek permission to withdraw from pending matters when grievances are filed against them. The pool of attorneys available to replace them is large. The circumstances are quite different regarding judges. There are certain to be an inordinate number of *sua sponte* disqualifications, just to avoid the appearance of impropriety.

Grievants often file requests for investigation against judges while matters are still pending before the judge. If judges receive mandatory notice that a grievance is pending, where the resolution of the investigation is unknown, they, like attorneys, may be more compelled to disqualify themselves than if notice was provided only when the grievance was resolved and dismissed. The uncertainty of the resolution of the investigation necessarily creates a greater concern over whether a judge is biased and can continue to serve on a case. It is frequently more cumbersome to replace a judge than an attorney in a pending matter.

Proposed sub-rule (1) as written also raises significant questions. What does the term "promptly" mean? What facts make a complaint "clearly unfounded or frivolous?" Under what circumstances should notice be postponed?

There are also practical problems with the requirement under proposed sub-rule (1). The Commission's staff currently makes an initial review of each request for investigation, and submits it to the Commission for dismissal or for authority to conduct additional investigation. That investigation typically consists of phone calls or anonymous review of public documents, and usually provides the Commission with information on which to make an informed decision. Under the proposed rule, the staff would not be able to make that initial review. The Commission cannot determine if a matter is clearly unfounded or frivolous if the staff cannot make an initial investigation to provide preliminary information to the Commission. The better standard is to require notice to the judge if the Commission is considering any action greater than an outright dismissal.

The requirement that the Commission send 28-day letters to all judges when anything other than an outright dismissal is considered will create an administrative headache on the part of the Commission ***and*** the judges. There must be some less formal manner in which to investigate claims, seek a judge's input, and subsequently remind a judge of a certain ethical provision or to exercise restraint in less serious situations. A great many of the 10% of judges whose comments are sought are often concerned about the time needed to reply. The Commission typically expects judges to reply in 30 to 45 days. Transcripts are often needed to reply, and it may take longer than 28 days to have one prepared.

Mandating a 28-day period for all replies, and requiring submitting the matter to judges in all cases where any criticism of conduct is considered, is overreaching, impractical, and certain to delay the processing of the 90% of cases that would otherwise have been dismissed anyway.

On rare occasions in the past a judge may have complained about not being able to challenge admonitions. The Commission has never issued an admonition without requesting a judge's comment, and therefore the judge is always allowed an opportunity to provide input. Complaints regarding admonitions might be resolved if the rules contained a requirement that a judge's comments be obtained prior to any issuance of an admonition (which is in conformity with current practice anyway). The rule would also allow the judge to make a written request for reconsideration of an admonition before it is deemed final. It is significant that an admonition is not a "sanction" recognized by the constitution or defined as such by the court rules.

The best approach by the Commission to gauge the severity of the inquiry and consider possible resolutions is to mandate an informal request for comment before the issuance of any resolution by the Commission except an outright dismissal, and keeping all other notice provisions of the existing court rules the same. Therefore, the Commission must issue the respondent-judge a 28-

day letter before authorizing a complaint or recommending a private censure to the Supreme Court.

ALTERNATIVE 9.207(C), (D) and (E)- replacing proposed (C)(1) and (2)

9.207(C) Notice to Judge and Grievant.

(1) Before filing a complaint or recommending an order of private censure, the commission must give written notice to the judge of the nature of the charges being made and afford the judge an opportunity to present in writing, within 28 days, any matters the judge chooses for consideration by the commission.

(2) Before issuing an admonition, dismissal with cautionary or explanatory letter, or dismissal with conditions, the commission must give informal written notice to the judge of the nature of the allegations made in the request for investigation and afford the judge a reasonable opportunity to comment upon those allegations.

[Revised current rule.]

9.207(D) Dismissal With or Without Explanatory or Cautionary Letter or With Conditions.

Dismissal pursuant to these provisions is confidential, and the grievant shall merely be advised that the matter has been resolved without the filing of a complaint. The judge who was the subject of the request for investigation shall be given written notice of the disposition. Any explanatory or cautionary letter shall be in writing and its existence shall not be disclosed to the grievant.

[New provision.]

9.207(E) Admonition.

The content of an admonition is confidential. A respondent may, in writing, seek reconsideration by the commission of an admonition within 21 days after it has been issued. Upon the expiration of that period, or upon reconsideration by the commission, the admonition is deemed final. A respondent is not entitled to a

hearing on the reconsideration. Notification that an admonition has been issued, but not its content, shall be released to the grievant where it becomes final.

[Revised from current MCR 9.207(E).]

PROPOSED 9.207(C)(3)

(3) The commission shall hold a hearing if the judge so requests in response to notice of the commission's decision to proceed under subrules (B)(2)-(5).

Comment- *High concern*

This provision is also extremely problematic. Under the proposed rules a judge can request a hearing for any resolution under paragraphs (B)(2)-(5), (*i.e.,* dismiss with explanation or caution, etc.), if the matter is resolved with anything other than an outright dismissal. Judges would have nothing to lose by requesting a review in each case. That would significantly increase the workload of the Commission, as each judge would likely seek a hearing.

Under the present system, it is difficult to consider cautionary letters and letters of explanation even as serious as "slaps on the wrist," due to the fact that they are so congenial in nature. The American Judicature Society knows of no other state that requires a hearing if the judge requests one prior to the issuance of an "advisory letter" (the equivalent of a cautionary or explanatory letter).

Commissioners are unpaid, meet only once per month, and come from across the state. It currently takes a full meeting day to complete the business of the Commission. This proposal would easily triple the number of commission meetings. In addition, faced with the prospect of additional hearings regardless of

the form of dismissal, the Commission may be more inclined to authorize a formal complaint on borderline cases. That would have the intended effect of reducing cases that would be headed for admonition, cautionary letters, or explanatory letters under the current system, but creating the unintended result of increasing formal complaints.

The proposed rule also lacks any details as to the nature of the hearing. It appears it would be held before the commission. Are written briefs allowed? Can witnesses testify? Can the matter be reviewed by the Supreme Court after the Commission decision has been issued? How long does the judge have to object to Commission action under proposed MCR 9.207(B)(2) – (5)? Is the hearing provided in 9.207(C)(3) open to the public?

It is impracticable to hold hearings in every such case, ***especially*** where the respondent has already had the opportunity to advise the Commission in writing of any concerns. The court rules allow a trial judge to dispense with oral argument (*i.e.*, "a hearing"), MCR 2.119(E)(3), as may the Court of Appeals, MCR 7.214(E). Thus, the actual appearance before the tribunal is not the *sine qua non* of due process; the opportunity to be heard is. Respondent judges have the opportunity to be heard, in writing, so their due process interests are protected.

The Commission strongly opposes the concept that a hearing is necessary or warranted in actions under 9.207(B)(2) – (4). Rather, the Commission's

suggestion (and current practice) that no admonishment issue without having first afforded the respondent the opportunity to comment in writing is sufficient. Any other action, *i.e.*, dismissal with a cautionary or explanatory letter, is still a dismissal, thus obviating the need for a hearing. Cautionary and explanatory letters are not discipline and do not need elevation to disciplinary status by overemphasizing their significance.

However, for private censure, the Commission suggests modification of the current procedure. . The Commission proposes that a respondent judge have twenty-one (21) days from the date the Commission files its recommendation of private censure in the Supreme Court pursuant to proposed 9.207(B)(5) to file a written objection in the Court and serve the Commission with a copy. In addition, the rule should note that any hearing on remand at this pre-formal complaint phase must be non-public to maintain confidentiality. Both the Supreme Court and Court of Appeals have twenty-one (21) day limitations to motions for reconsideration, MCR 7.313(D)(1) and 7.215(H)(1) respectively. A respondent's demand for such a hearing is, in effect, akin to a motion for reconsideration.

ALTERNATIVE ADDITION to 9.207(C)(3)

(3) A respondent may file a written objection with the Supreme Court within twenty-one (21) days of the Commission filing in the Court a recommendation for private censure demanding a non-public, non-evidentiary hearing before the Commission. In such case, the Supreme Court shall hold consideration of the Commission's recommendation in abeyance until the Commission files a supplemental recommendation affirming, modifying or withdrawing its prior recommendation.

PROPOSED 9.207(C)(4)

(4) On final disposition of a request for investigation without the filing of a complaint, the commission shall give written notice of the disposition to the judge who was the subject of the request. The commission also shall provide notice to the complainant that the matter has been resolved without the filing of a complaint.

~~(D) Resolution of Investigation. If the preliminary examination does not disclose sufficient cause to warrant filing a complaint, the commission may:~~

~~(1) dismiss the investigation;~~

~~(2) admonish the respondent; or~~

~~(3) recommend to the Supreme Court private censure, with a statement of reasons in support of its recommendation.~~

~~The commission must promptly notify the judge of its decision to use one of these alternatives.~~

Comment- *High concern*

This proposed revision, which limits notice to a grievant that the matter has been resolved without filing a formal complaint, raises concern. If a matter is resolved with a private censure (which is quite serious as it involves Supreme Court action) or an admonition, a grievant should be advised that it was resolved in that manner, but should not be advised of the *content* of the private censure or admonition. A grievant should not be notified, however, if the matter is resolved with a cautionary or explanatory letter.

There typically have not been any past publicity problems arising from notification to grievants. In fact, some matters received a great deal of press as the

public became aware of problems with judges, or that an investigation was ongoing. However, even though grievants were advised that the judge received an admonition, the matters did not resurface in the press except for one recent incident involving a homicide that was extremely well publicized. The right of the grievant to be informed of some disciplinary outcome based on the grievant's complaint seems to outweigh the benefit of avoiding any potential adverse publicity to the judge. That is particularly true considering the risk of keeping the grievant in the dark and left with the impression grievant's complaint was without any merit.

PROPOSED 9.207(E)

~~(E) Admonition; Order of Private Censure. An admonition or order of private censure is confidential. If the judge requests a hearing on the recommendation of private censure, the Supreme Court shall remand the case to the commission for a hearing.~~

~~(F) Notice of Disposition of Grievance. On final disposition of a grievance, the commission shall give written notice of the disposition to the complainant and may advise the judge charged with misconduct or disability.~~

Comment- *High concern*

As addressed above, the elimination of these provisions and the revisions proposed by the Supreme Court are extremely problematic. The Commission's comments and alternatives (C), (D), (E), and (F) address the deletion of these rules. The *content* of the admonition or private censure should remain confidential, but the grievant should receive notice of the *fact* that the respondent has been admonished or privately censured.

PROPOSED 9.208(C)

(C) Discovery.

(1) Pretrial or discovery proceedings are not permitted, except as follows:

(a) At least 21 days before a scheduled hearing,

(i) the parties shall provide to one another, in writing, the names and addresses of all persons whom they intend to call at the hearing, and a copy of all statements and affidavits given by those persons; and

(ii) the commission shall provide all exculpatory material to the respondent.

~~(1) Within 14 days after the answer to the complaint is filed, the commission shall, on the respondent's written demand, make available for inspection or copying by the respondent documentary evidence in the commission's possession that is to be introduced as evidence at the hearing;~~

~~(2) Within the same time, the commission shall give the respondent written notification of the name and address of any person to be called as a witness.~~

(b) The ~~commission~~ parties shall give supplemental notice to ~~the respondent~~ one another within 5 days after any additional witness has been identified and at least 10 days before a scheduled hearing~~;~~.

(~~3~~2) A deposition may be taken of a witness who is living outside the state or who is physically unable to attend ~~the~~ a hearing~~;~~.

(~~4~~3) The commission or the master may order a prehearing conference ~~held before the master~~ to obtain admissions or otherwise narrow the issues presented by the pleadings.

If a ~~the commission~~ party fails to comply with subrules (C)(1) or (2), the master may, on motion and showing of material prejudice as a result of the failure, impose one or more of the sanctions set forth in MCR 2.313(B)(2)(a)-(c).

Comment- *High concern*

The Commission suggests that the Court adopt an express "work product" limitation on discovery in the rules. The amendment should include a specific provision that Commission work product and confidential files (including undisclosed material concerning the investigation of the grievance[s] that led to the formal complaint) are excluded from discovery. The Commission suggests that in addition to the other items the parties must exchange pursuant to proposed MCR 9.208 (C)(1)(a)(i), they also exchange all exhibits they intend to introduce into evidence.

ALTERNATIVE to 9.208(C)(1)(b)

(1)(b) *All work product, and all confidential commission information concerning investigations but not relating to allegations in the formal complaint, is excluded from discovery. [New provision- and proposed sub-rule (1)(b) would be renumbered (1)(c).]*

PROPOSED 9.210

Rule 9.210 Appointment of Master and Examiners

(B) Appointment of Master.

(1) If the commission requests that the Supreme Court appoint a master to conduct the hearing, the ~~directs that the hearing be held before a master to be appointed by the Supreme Court, the commission must file an ex parte written request to the Supreme Court to appoint a master for that purpose, accompanied by a copy of the complaint. The Supreme~~ Court shall do so ~~must,~~ within a reasonable period ~~14 days after receipt of the request, appoint a master to conduct the hearing~~. The Court shall maintain a list of qualified judges and former judges for this purpose.

Comment- *High concern*

Some alteration to the method of appointment of masters is necessary. Currently, any past or present judge is eligible for appointment. However, there are no standards for sitting as a master. Can the master be a current or former bench mate of the Respondent, or should that fact alone disqualify a judge? Can a district court judge act as a master in a case against a circuit court judge? Does a master have to have been a judge for a certain number of years before qualifying to serve as a master, just as a judge is now required to have been an attorney for five years? Does the judge have to be free of any current grievances, if any, before being allowed to act as a master?

In order to avoid these issues, the Court should identify with greater clarity the qualifications for serving as a master. The Court should identify and publish the names of those so qualified (the way the attorney discipline system does) and

then select a master by blind draw (just as other litigants have their judges selected).

Alternatively, the Court should direct that the *Commission* maintain such a list and that the *Commission* appoint a master. The Commission, as fact finder, should have the right to select its own master, the way any other court has the right to do.

If the Court decides to retain authority to appoint the master, the Court should submit the name of the putative master to the executive director to inquire about any current or prior disciplinary issues. The rule of confidentiality of proceedings prior to formal complaint should be amended to allow the executive director to make that disclosure. The executive director, acting later as examiner, would not be allowed to disclose any such contacts the *master* has had, due to the rules of confidentiality. Accordingly, a motion to disqualify the master would effectively be pre-empted. The individual must also be required to disclose any possible basis for disqualification.

ALTERNATIVE TO MCR 9.210(B)

(B) Appointment of Master

(1) The Supreme Court shall establish and annually update a pool of candidates who are willing to serve as masters in formal proceedings under these rules. Current, former, and retired judges may volunteer to be included in the pool.

(2) The Supreme Court shall then choose a proposed master by a blind draw from the candidates in the pool.

(3) The Supreme Court shall then submit the selected name to the Executive Director who, notwithstanding MCR 9.222, shall provide the Supreme Court with information concerning any disciplinary record of the prospective master for consideration by the Court in making an appointment.

(4) The Supreme Court thereafter shall notify the proposed master of the selection. The proposed master shall then disclose to the Supreme Court any possible basis for disqualification as any judge is obligated to do under the Michigan Court Rules and Code of Judicial Conduct.

(5) The Supreme Court shall take all information submitted by the Executive Director and the proposed master into consideration before making the appointment, and shall thereafter advise the Examiner of the appointment.

(6) If for any reason a proposed master is not appointed, or an appointed master at any time resigns during the course of a disciplinary proceeding, this process shall be repeated for the selection of another proposed or a successor master.

PROPOSED 9.210(B)(2)

(2) The master shall set a time and place for the hearing and shall notify ~~give notice of the hearing to~~ the respondent and ~~to~~ the examiner at least 2~~1~~8 days in advance ~~before the date set~~. The master shall rule on all motions and other procedural matters incident to the complaint, answer, and hearing, except that rulings on dispositive motions shall not be announced until the conclusion of the hearing ~~subject to review by the commission after the filing of the master's report~~.

Comment- *High concern*

The proposed rule explicitly permits the master to hear dispositive motions. However, the rule implies that a master has authority to decide dispositive motions with finality, as the rule treats them in the same manner as those addressing procedural issues. It contains no reference to the fact that a master cannot decide them, but can merely make recommendations to the Commission. Permitting a master to decide dispositive motions is inconsistent with the Constitution, as it takes the decision-making authority away from the Commission. Further, announcing the decision at the end of the hearing, as opposed to making a recommendation with the report, implies that the master has decision-making authority as to those matters and does not have to render findings of fact or otherwise address the issue in his report. The master must be explicitly limited to considering dispositive motions and announcing his "recommendation" to the Commission *after* the conclusion of the hearing, and with his full report to the Commission of his proposed findings of fact and conclusions of law.

ALTERNATIVE 9.210(B)(2)

(2) The master shall set a time and place for the hearing and shall notify the respondent and the examiner at least 28 days in advance. The master shall rule on all motions and other procedural matters incident to the complaint, answer, and hearing, except that *recommendations* on dispositive motions shall not *be made until the master issues a report to the commission*.

[Revised Supreme Court proposed MCR 9.210(B).]

PROPOSED 9.210(C)

(C) Appointment of Examiners. The executive director shall act as the examiner in ~~every~~ a case in which a formal complaint is filed, ~~except~~ unless ~~that~~ the commission ~~may~~ appoints another attorney ~~additional associate examiners in individual cases~~ to act as examiner.

Comment- *Moderate concern*

The provision allowing the Commission to appoint associate examiners was deleted. As staff attorneys always assist in preparing for formal proceedings, the provision should acknowledge that practice. The removal of the provision implies that only the examiner can serve to prosecute the formal complaint, which in many cases would be difficult or impossible. The proposed rule is also inconsistent with current practice where an associate examiner serves on every formal proceeding.

ALTERNATIVE 9.210(C)

(C) Appointment of Examiners. The executive director shall act as the examiner in a case in which a formal complaint is filed, unless the commission appoints another attorney to act as examiner. *The commission may appoint additional associate examiners in individual cases.*

[Revised Supreme Court proposed MCR 9.210(C).]

PROPOSED 9.211

Rule 9.211 Public Hearing

(A) Procedure. ~~At the time and place set for hearing, the commission or the master shall proceed with a~~ The public hearing~~, which~~ must conform as nearly as possible to the rules of procedure and evidence governing the trial of civil actions in the circuit court. The hearing must be held whether or not the respondent has filed an answer or appears at the hearing. The examiner shall present the evidence in support of the charges set forth in the complaint, and at all times shall have the burden of proving the allegations by a preponderance of the evidence. A respondent is entitled to be represented by an attorney. Any employee, officer or agent of the ~~judge's~~ respondent's court, law enforcement officer, public officer or employee, or attorney who testifies as a witness in the hearing, whether called by the examiner or by the judge, is subject to cross-examination by either party as an opposite party under MCL 600.2161~~; MSA 27A.2161~~.

(B) Failure to Appear. The respondent's failure to answer or to appear at the hearing may not, standing alone, be taken as evidence of the truth of the facts alleged to constitute grounds for commission action. The respondent's failure to answer, to testify in his or her own behalf, or to submit to a medical examination requested by the commission or the master, may be considered as an evidentiary fact, unless it appears that the failure was due to circumstances unrelated to the facts in issue at the hearing.

(C) Record. The proceedings at the hearing must be recorded by stenographic or mechanical means ~~a voice recorder or by a stenographer designated by the commission or master~~.

(A) Rulings. When the hearing is before the commission, at least 5 members must be present while the hearing is in active progress. Procedural and other interlocutory rulings must be made by the chairperson, and are taken as consented to by the other members of the commission unless a member calls for a vote, ~~and then~~ in which event a ruling must be made by a majority vote of those present.

Comment- *Low concern*

The Commission suggests modifying the standards for admissibility of evidence in judicial disciplinary hearings. The Commission recommends including the following language:

> Evidence which would not be admissible in the trial of a circuit court civil action may be admitted if such evidence is trustworthy, probative and the interests of justice will best be served by admission of the evidence.

The proposed rules also do not provide for making a separate record in the event either the master or the Commission declined to admit evidence at the formal hearing, which is consistent with past practice.

PROPOSED 9.212

Rule 9.212 ~~Issuance, Service, and Return of~~ Subpoenas

~~At the request of the commission, the master, the examiner, the respondent, or the respondent's attorney, subpoenas for the attendance of witnesses and the production of documents before the commission or master may be issued out of the circuit court in the county in which the hearing is to be held, in like manner and with like effect as in civil proceedings. Before the filing of a complaint, the entitlement of the case may not disclose the name of the judge under investigation.~~

(A) Issuance of Subpoenas

(1) Before the filing of a complaint, the commission may issue subpoenas for the attendance of witnesses to provide statements or produce documents or other tangible evidence exclusively for consideration by the commission and its staff during the preliminary investigation. Before the filing of a complaint, the entitlement appearing on the subpoena shall not disclose the name of a judge under investigation.

(2) After the filing of a complaint, the commission may issue subpoenas either to secure evidence for testing before the hearing or for the attendance of witnesses and the production of documents or other tangible evidence at the hearing.

(B) Sanctions for Contempt; Disobedience by Respondent.

(1) Contempt proceedings against a nonparty for failure to obey a subpoena issued pursuant to this rule may be brought pursuant to MCR 2.506(E) in the circuit court for the county in which the individual resides, where the individual is found, where the contempt occurred, or where the hearing is to be held.

(2) If a respondent disobeys a subpoena or other lawful order of the commission or the master, whether before or during the hearing, the commission or the master may order such sanctions as are just, including, but not limited to, those set forth in MCR 2.313(B)(2)(a)-(e).

Comment- *Low concern*

The staff is somewhat concerned that judges whom it has investigated or may be investigating may decide issues concerning subpoenas. In smaller counties, the disqualification process may result in hardships and create difficulties when time is of the essence. A better process may be to adopt a system similar to that used to appoint masters, where retired judges can address any issues where a judicial decision is necessary.

PROPOSED 9.214

Rule 9.215~~4~~4 Report of Master

Within 2~~8~~1 days after ~~the~~ a transcript of the proceedings is provided, ~~conclusion of the hearing before a master,~~ the master shall prepare and transmit to the commission in duplicate a report ~~which must~~ that contains a brief statement of the proceedings and findings of fact and conclusions of law with respect to the issues presented by the complaint and answer. The report must be accompanied by two copies of the transcript of the proceedings before the master. On receiving the report and transcript, the commission must promptly send a copy of each to the respondent.

Comment- *Low concern*

The Commission previously noted that the current and draft rules do not comply with current practice because of their impracticability. The proposed rule suggests the master is to receive two sets of transcripts, which are forwarded to the respondent and the examiner with the master's report. This fails to consider the fact that the examiner orders the transcript at the Commission's expense. The fairest and most practical procedure, currently employed, is for the rules to require the examiner to order three sets of transcripts, so the master, the respondent and the examiner receive them contemporaneously.

PROPOSED 9.219

Rule 9.2~~20~~19 Interim Suspension

(A) Petition.

(1) After a complaint is filed, t~~h~~e commission may petition the Supreme Court for an order suspending a judge from acting as a judge until final adjudication of the ~~a~~ complaint.

(2) In extraordinary circumstances, the commission may petition the Supreme Court for an order suspending a judge from acting as a judge in response to a request for investigation, pending a decision by the commission regarding the filing of a complaint.

Whenever a petition for interim suspension is granted, the processing of the case shall be expedited in the commission and the Supreme Court.

(B) Contents; Affidavit or Transcript. The petition must ~~allege facts supported~~ be accompanied by a sworn affidavit or court transcript, and state facts in support of the allegations and the assertion ~~indicating that the judge is guilty of misconduct in office as defined in MCR 9.205(C) or (E) or suffers from physical or mental disability as defined in MCR 9.205(D) and~~ that immediate suspension is necessary for the proper administration of justice.

(C) Service; Answer. A copy of the petition and supporting documents must be served on the respondent who may file an answer to the petition within 14 days after service of the petition. The commission must be served with a copy of the answer.

Comment- *Low concern*

The Commission recommends that the Court adopt a number of specific proposals, including the option of holding pay in escrow during suspension and keeping documents under seal if the petition is made prior to filing a complaint.

The Commission suggests that it would be helpful to allow Commissioners who have read the transcript of the hearing to participate in the discussion. The Commission notes that based on past experience, the Supreme Court itself allows

Justices to participate in a decision even if they did not attend oral argument as long as the particular Justice reads the transcript of the argument or watches the video. The Commission was of the opinion that as a whole it would benefit from the participation of as many commissioners as possible, which in turn better serves the public.

The proposed rule is also unclear regarding the requirement that the majority be made of Commissioners who were present at the hearing. It does not address whether others could participate in deliberations or write a dissent. Under the proposed rule a Commissioner could take either action, and could even cast a vote with the majority, although the vote could not be considered by the Supreme Court.

(B) Record of Decision.

(1) The commission must make written findings of fact and conclusions of law along with its recommendations for action with respect to the issues of fact and law in the proceedings, but may adopt the findings of the master, in whole or in part, by reference.

(2) The commission shall undertake to ensure that the action it is recommending in individual cases is reasonably proportionate to the conduct of the respondent, and reasonably equivalent to the action that has been taken previously in equivalent cases.

(C) Disclosure to Attorney Grievance Commission. Notwithstanding the prohibition against disclosure in this rule, the commission shall disclose information concerning allegations regarding a judge ~~misconduct~~ to the Attorney Grievance Commission, upon request. Absent a request, the commission may make such disclosure to the Attorney Grievance Commission. In the event of a dispute concerning the release of information, the Attorney Grievance Commission may petition the Supreme Court for an order of disclosure, and the Judicial Tenure Commission may file a response.

Comment- *High concern*

The Commission is concerned that the rule fails to identify what "information" it is required to disclose at the Attorney Grievance Commission's request. The proposed rule does not specifically address that issue. Moreover, this provision permits ***only*** the Attorney Grievance Commission to petition the Supreme Court to address any dispute that may arise. The Commission is permitted to file a response, but not to initiate a petition The Commission should be given equal access to allow the Court to resolve any disputes. No time periods are provided limiting the dates for filing any petition or response.

In addition, the proposed rule addresses information regarding *allegations* against a judge, as opposed to *findings* of "misconduct." The rule contains no obligation for the Attorney Grievance Commission to maintain the confidentiality of the material provided. Therefore, the rule as proposed permits the Attorney Grievance Commission to have access to all of the Commission files, unless the Supreme Court intervenes.

ALTERNATIVE 9.221(E)

Notwithstanding the prohibition against disclosure in this rule, the commission shall disclose to the Attorney Grievance Commission, upon request, the following:

(a) If formal proceedings have been initiated, all discoverable information, as defined in MCR 9.208(C), concerning allegations against a judge.

(b) If formal proceedings have not been initiated, and a matter is resolved by a judge's consent to a public censure or suspension

without filing a formal complaint, all discoverable information that it would be obligated to produce under MCR 9.208(C) if a formal complaint had been filed.

Absent a request, the commission may make such disclosure to the Attorney Grievance Commission. In the event of a dispute concerning the release of information, the Attorney Grievance Commission *or the Judicial Tenure Commission* may petition the Supreme Court for an order of disclosure, and the *opposing party* may file a response.

[Revised Supreme Court proposed MCR 9.221(E).]

PROPOSED 9.225

Rule 9.225 Decision by Supreme Court

The Supreme Court shall review the record of the proceedings and ~~shall~~ file a written opinion and judgment, which may accept or reject the recommendations of the commission, or modify the recommendations by imposing a greater, lesser, or entirely different sanction ~~direct censure, removal, retirement, suspension, or other disciplinary action, or reject or modify the recommendations of the commission~~. When appropriate, the Court may remand the matter to the commission for further proceedings, findings, or explication. If the respondent and the commission have consented to a course of action under subrule 9.220(C) and the Court determines to impose a greater, lesser, or entirely different sanction, the respondent shall be afforded the opportunity to withdraw the consent and the matter shall be remanded to the commission for further proceedings.

Comment- Moderate concern

The proposed rule affords the respondent (but not the examiner) an opportunity to withdraw consent if the Supreme Court imposes a greater, lesser or entirely different sanction. The rule should allow the examiner to withdraw from the agreement too, as it is similar to a negotiated settlement where neither party has an advantage over the other. The agreement is typically reached based upon the examiner giving up the opportunity to prove some allegations at a formal hearing. If the sanction rendered by the Supreme Court is too lenient, the examiner should have the opportunity to withdraw and prove the allegations at a hearing.

ALTERNATIVE 9.225

The Supreme Court shall review the record of the proceedings and file a written opinion and judgment, which may accept or reject the recommendations of the commission, or modify the recommendations by imposing a greater, lesser, or entirely different sanction. When appropriate, the Court may remand the matter to the commission for further proceedings, findings, or explication. If the respondent and the commission have consented to a course of action under subrule 9.220(C) and the Court determines to impose a greater, lesser, or entirely different sanction, the respondent *or the commission* shall be afforded the opportunity to withdraw the consent and the matter shall be remanded to the commission for further proceedings.

[Revised Supreme Court proposed MCR 9.221(E).]

Respectfully Submitted

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